STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case No 070403231

State of Minnesota,

Plaintiff,

vs.

Larry Edwin Craig,

Defendant.

PLAINTIFF'S MOTION TO STRIKE MEMORANDUM OF LAW OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

TO: ABOVE-NAMED DEFENDANT BY AND THROUGH HIS ATTORNEYS THOMAS M. KELLY KELLY & JACOBSON, 220 SOUTH SIXTH STREET, SUITE 215, MINNEAPOLIS, MINNESOTA 55402; WILLIAM R. MARTIN AND KATHLEEN H. SINCLAIR, SUTHERLAND, ASBILL & BRENNAN, LLP 1275 PENNSYLVANIA AVENUE NW, WASHINGTON, D.C. 2004-2415

AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA BY AND THROUGH ITS ATTORNEY TERESA NELSON, AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA FOUNDATION, 450 NORTH SYNDICATE, SUITE 230, SAINT PAUL, MINNESOTA 55104.

The State of Minnesota (Metropolitan Airports Commission) respectfully moves the Court to strike from the record for consideration in the matter of Defendant's Rule 15.05 Motion to Withdraw the Memorandum of Law of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Minnesota in Support of Defendant.

This motion is based on the record in this case as well as the Memorandum of Law, and Proposed Order served and filed with this Motion.

Respectfully Submitted,

Dated: September 20, 2007

By _____

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case No. 07043231

State of Minnesota,

Plaintiff,

vs.

Larry Edwin Craig,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE

INTRODUCTION

This motion requests that the Court strike from the pleadings the Memorandum of Law of Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Minnesota in Support of Defendant (hereinafter "Memorandum"). The Memorandum concentrates on issues irrelevant to the Defendant's Rule 15.05 motion that is before the Court and seeks to improperly interject the amici curiae's own agenda into the instant case. In addition, the points raised by the amici curiae are inapplicable to the case at bar, in addition to being inappropriate at the District Court level.

The Court should strike the pleadings submitted by the American Civil Liberties Union and American Civil Liberties Union of Minnesota (hereinafter collectively referred to as the "Requestors") in considering the Defendant's Rule 15.05 Motion to Withdraw.

PROCEDURAL POSTURE

The Defendant entered into a negotiated written plea petition to plead guilty to the crime of Disorderly Conduct on August 1, 2007. The written plea petition was

entered with the Court on August 8, 2007, the date of the Defendant's continued arraignment appearance.

On September 10, 2007, the Defendant filed a motion pursuant to Minnesota Rule of Criminal Procedure 15.05 seeking to withdraw his plea of guilty. The matter has been scheduled for oral argument before The Honorable Charles Porter of Hennepin County District Court on September 26, 2007.

On September 17, 2007, the ACLU and the ACLU of Minnesota filed a request to participate as amici curiae and provided its Memorandum with the same. A day later, the Court granted the request. Plaintiff did not have the opportunity to address the request before it was granted.

LAW AND ARGUMENT

I. THE ISSUES RAISED BY THE AMICI CURIAE ARE INAPPROPRIATE AND RESULT IN THE VERY PROBLEMS THAT COURTS HAVE DETERMINED SHOULD BE AVOIDED IN THE PARTICIPATION OF AMICUS CURIAE.

The rights of amici curiae are limited and in the absence of exceptional circumstances, amici curiae 'may not expand the scope of an appeal to implicate issues not presented by the parties to the district court." 2A *Federal Procedure, Lawyers Edition* § 3:721 "Brief by amicus curiae" (citing *McKleskey v. Zant*, 499 U.S. 467 (1991). Amici curiae ordinarily are foreclosed from filing briefs seeking to inject new issues on appeal which were not before the trial court. 4 *American Jurisprudence, 2nd Edition*, Amicus Curiae § 8 (Sept. 2007) (citing *McKleskey*, 499 U.S. 467; *In re Alappat*, 33 F.3d 1526, 1536 (Fed. Cir. 1994)). The issues raised by the Defendant in his motion appropriately relate to the cardinal questions regarding a motion to withdraw a plea—whether there is inaccuracy, inappropriate pressures, or unintelligence to such a degree

as to constitute manifest injustice. (*See generally* Rule 15.05 Motion to Withdraw.) The Defendant's arguments in relation to those questions are generally: 1) that those facts to which the admitted Defendant in a post-*Miranda*, though pre-plea, interview do not constitute disorderly conduct; 2) that the Defendant was under pressure from an investigation by the *Idaho Statesman* newspaper that resulted in his plea to a crime he did not commit; and 3) that the Defendant was assured by the arresting officer that the matter would not be publicized and he relied on that assurance in pleading guilty. (*Id.*) The Defendant did not raise issues regarding the constitutionality of the disorderly conduct statute. (*Id.*) Instead, the amici curiae filed a request to participate with this Court only nine days prior to the hearing on the motion, and with that request inserted these constitutional issues into a motion in which these issues were not previously involved. This is precisely the role that amici curiae are not to play in a case. As further evidence of the failure by the amici curiae to address those issues which are properly before the Court, the Memorandum contains twelve pages and, of those twelve pages, only one paragraph consisting of two sentences addresses the issue currently before the Court—whether the Defendant should be permitted to withdraw his plea of guilt. (Mem. Law of Amici Curiae ACLU and ACLU MN Supp. Def. at 11.) The Court should grant the Plaintiff's Motion to Strike the Memorandum filed by the amici curiae.

II. THE DISTRICT COURT POSTURE OF THE CURRENT MOTION BY DEFENDANT IS AN INAPPROPRIATE FORUM FOR AMICI CURIAE.

There is no procedure in Minnesota Courts wherein amici curiae can participate at the District Court level. The rules in Minnesota permit participation of amici curiae in appellate matters in which certain requirements are met, but no provisions allow for the same at the District Court level. Minn. R. Crim. P. 28.01 subd. 2; Minn. R. Civ. App. P.

129.01. The very purpose of an amicus brief is "to broaden the discussion of important points of law in cases pending before the *appellate* courts." (emphasis added) Eric Magnuson and David Herr, Rule 129, *Minnesota Practice Appellate Rules Annotated*, § 129.01 (2007). The case is a District Court matter involving two parties—the State of Minnesota (Metropolitan Airports Commission) and the Defendant Larry Craig. It is inappropriate to include another party by permitting the amici curiae's Memorandum to remain a part of the record for the Court's consideration. The Court should grant the Plaintiff's Motion to Strike.

The confused intrusion of an amici curiae request in this District Court proceeding further is underscored by the filing of the request itself. Those seeking to participate as amici curiae filed, according to the cover letter sent to the Court, an original and four copies of the request, the same number as is required when filing a motion to the Court of Appeals. *See* Minn. R. Civ. App. P. 127. The actions of the amici curiae themselves illustrate the impropriety of participation by amici curiae at the state District Court level. The Court should strike the Memorandum submitted by the amici curiae for being inappropriately submitted at the District Court level.

III. NOT ONLY IS THE MEMORANDUM OF THE AMICI CURIAE IMPROPER DUE TO THE INTERRUPTION OF NEW ISSUES AND THE WRONG FORUM, BUT THE REMARKS IN THE MEMORANDUM ARE WITHOUT SUBSTANTIVE MERIT AS WELL.

A. Amici Curiae Misfocus Their Attention on the "Fighting Words" Doctrine in a Case Where the Underlying Conduct Is Physical, Not Verbal, and any Suggestion that the Conduct was "Sexual Speech" Is Contradicted by the Very Defendant the Amici Curiae Claim to Support.

The concentration of the amici curiae on the "fighting words" doctrine of the disorderly conduct statute is misplaced and has no bearing on the Defendant's Rule

15.05 motion before the Court.[1] (*See* Mem. Law of Amici Curiae ACLU and ACLU MN Supp. Def. at 2 (stating that the "more powerful reason to relieve the defendant of his plea" is the restriction of the disorderly conduct statute to fighting words).) The case against the Defendant and regarding which Defendant pled guilty to is not about verbal conduct, but is in regards to physical conduct; in fact, the Defendant's plea petition makes that explicitly clear. (*See* Plea Petition at 1.) The amici curiae attempt to morph the Defendant's case into one which fits their purposes of attacking the constitutionality of the statute by taking Defendant's conduct and dressing it up as speech, albeit sexual invitation speech.

However, one of the primary problems that plagues the assertions by the amici curiae is that their argument requires that either (i) the Defendant was engaging in the speech of inviting sex in a private place from a stranger in an adjacent bathroom stall or (ii) the Defendant's conduct was not such a sex invitation, but rather was just entering into the private vestige of the adjacent bathroom stall multiple times with different parts of his body. The former is conduct which the Defendant has denied vehemently. (*See* Rule 15.05 Motion Withdraw at 4.) The latter is conduct to which the portion of the statute addressing conduct squarely applies and the constitutional concerns raised by the amici curiae have no application.

[1] The question that the Court determined in the *In re S.L.J.* case was in regards to "offensive language" being the basis of a criminal charge. 263 N.W.2d 412, 416 (Minn. 1978). The *S.L.J.* Court's detailed analysis goes through the limited times in which the use of words falls outside of their First Amendment protections and can therefore be criminalized. *Id.* at 416-17. In fact, the *S.L.J.* case specifically concentrated on the portion of the statute regarding "offensive, obscene or abusive language," not on the portion of the statute which applied to the Defendant's conduct—"offensive, obscene, abusive, boisterous, or noisy conduct." *Id.* at 418; Minn. Stat. § 609.72. As previously stated, the plea petition containing that to which the Defendant pled referenced physical conduct, not language or verbal conduct. (*See generally* Plea Petition.) The *S.L.J.* case and its progeny simply have no application in the case at bar, as is true for the arguments of the amici curiae.

B. Even Were the Court to Be Convinced that Judicial Narrowing of the Statute Would be Necessary, Defendant's Conduct Still Would Come Under Its Purview as Conduct, Which Would Incite an Immediate Breach of the Peace.

Even if this Court determined, despite the impropriety of the amici curiae's participation and the inapplicability of their arguments, that the statute in question was overly broad and needed to be interpreted narrowly, the Defendant's conduct is such as to incite an immediate breach of the peace. The Metropolitan Airports Commission began its plain clothes detail of the men's restroom at the airport on the heels of an incident in which a private citizen was seated in the stall, the individual next to him invaded the space of the adjacent stall and looked up under the stall divider. The victim was so upset that he waited for that defendant to come out of his stall and took him to a security checkpoint to call the police. This kind of conduct, the kind advocated by the amici curiae and in which the Defendant engaged, angers and alarms people It is hardly a stretch to understand that many people attempting to use a public bathroom stall for the purposes for which it was intended, purposes which are personal and intimate to one's hygiene and which require disrobing parts of one's body generally considered private, and who experience this kind of conduct would be prompted to fight or otherwise immediately breach the peace as to the offending individual. Therefore, even if the Court were to engage in the unnecessary judicial narrowing of application advocated by the amici curiae, the conduct of the Defendant in this case still would violate the Disorderly Conduct statute.

C. That an Officer Was the Person in the Adjacent Stall Has No Bearing on the Defendant's Violation of the Disorderly Conduct Statute.

The contention by the amici curiae that because it was an officer in the acjacent stall, there was no disturbance to support disorderly conduct, ignores both the statutory language and precedent. The statute prohibiting disorderly conduct states that if one engages in conduct that they know or have reasonable grounds to know that would *tend* to arouse alarm or anger or resentment in others, that person is guilty of a misdemeanor. Minn. Stat. § 609.72, subd. 1(3). The assertion by the amici curiae fails to take into account the word "tend." The caselaw similarly holds that a person can commit disorderly conduct without committing an offense against a person. *State v. Soukup*, 656 N.W.2d 424 (Minn. Ct. App. 2003), *review denied* (April 29, 2003). In fact, actual commotion from the conduct need not occur, it is sufficient that the defendant's conduct was likely to arouse anger. *Id.* (citing *City of St. Paul v. Azzone*, 287 Minn. 136, 139-40, 177 N.W.2d 559, 561-62 (1970)). In the case at bar, the Defendant invaded the sanctity of the officer's bathroom stall, first by repeatedly staring into the stall, second by moving his foot over in a controlled and deliberate manner until it was on and touching the officer's foot within the officer's stall, and third by stroking his hand from front to back along the stall divider three times with increasingly greater amounts of the Defendant's hand being exposed on the officer's side of the stall divider with each swipe. These multiple intrusions into a stall occupied by another person certainly are sufficient for a person to know, or at least for the person to be expected to know that it would *tend* to arouse alarm or resentment in other people. For that reason, the Defendant's conduct on June 11, 2007 in the restroom at the Northstar Crossing of the Minneapolis-St. Paul International Airport most certainly constituted disorderly conduct.

D. The Contention by the Amici Curiae that Acts Which Arouse Alarm and Resentment in Others Can Not Be Criminalized Because Person(s) Employ the Acts to Communicate the Desire to Have Sex Is Non-Sensical.

To the extent that it is the assertion of the amici curiae that invasion of another stranger's personal space must be allowed because it is actually a form of speech inviting sex in a private place, the assertion should be cast aside as simply absurd. In the event that a person or group of people decide to engage in otherwise criminal conduct as a means of communicating that they wish to engage in other conduct which is acceptable(such as sexual relations in a private place), that acceptable conduct does not excuse the initial criminal conduct. The conduct on which the plea is based and which the officer observed included multiple intrusions into the area of the officer's stall, conduct that would tend to arouse alarm or resentment in others. Defendant and other participants should not be afforded protection from statutes prohibiting conduct that arouses alarm or resentment simply because certain people use that conduct to communicate their desire to have sex.

E. The Tenet of the Argument by the Amici Curiae that the Solicitation of Sex in the Airport Bathroom Is for Sex in a Private Place Is Belied by the Other Cases Arising from Similar Circumstances at the Airport and the Characteristics of an Airport Itself.

In multiple other cases Metropolitan Airports Commission police officers have observed individuals engage in the very same pattern of conduct that the Defendant did, but that conduct led to masturbatory sounds in the adjacent stall, placing one's lower torso (including one's penis) under the stall divider, and putting one's head under the stall divider to look at the adjacent occupant. These outcomes from the same conduct in which the Defendant engaged are clear indication that the sexual exchanges that were to take place were to take place in the public bathroom and often at floor level

visible to others under the dividers. Furthermore, in interviews of defendants arrested on similar charges, as well as resultant reviews of websites, it is clear that the sexual relations for which people had been communicating in the restroom were relations that occurred in the public restroom, not elsewhere. Therefore, the suggestion by the amici curiae that the Defendant's conduct was an invitation for private sex (which Defendant denies) and therefore can not be criminalized is not only legally flawed but is at odds with the experience of the airport police officers in other cases involving similar conduct.

An international airport is a location where much of its population is transient. They are travelers on their way to, from, or through the Minneapolis-St Paul International Airport.[2] The nature of such a population is far more suggestive of scenarios wherein these random passers-by complete invited sexual acts in the public restroom before moving onto the next destination in their travels, rather than finding a private location. Anyone who has spent time in an airport also knows that there are very few private locations, much less locations to accommodate sexual interludes with strangers. The suggestion by the amici curiae that the conduct of the Defendant was likely an invitation to have private sex and therefore should not be criminalized fails to recognize the realities of a major metropolitan airport, both in the transient nature of much of its population and the lack of private spaces in such a location. The argument by the amici curiae has no relevance to the circumstances of the Defendant and the Defendant's motion to withdraw his plea.

[2] In fact, the Defendant's own affidavit describes his being between flights. (Craig Aff. ¶ 4.) To the extent that the amici curiae's assumption that Defendant was engaged in an invitation for sex in a private place is accepted, that assumption does not comport with Defendant's concerns about being late for his flight so that any sexual conduct in which the Defendant may have intended to engage could not take place anywhere except in the bathroom.

F. The Manner in Which the Police Department Chose to Address the Sex in Public Bathroom Problem Is Not a Basis for Addressing the Constitutionality of the Statute's Application.

The arguments by the amici curiae regarding the manner in which the police were conducting the investigation are a concern of the police department and provide no legal basis to refrain from applying the statute or for withdrawing Defendant's plea. The cases cited by the amici curiae concerned the constitutionality of statutes or ordinances themselves and had nothing to do with the tactics used to determine if a statute was being violated. (See Mem. Law of Amici Curiae ACLU and ACLU MN Supp. Def. at 9.) In the event that there was a cognizable challenge to the manner in which the police conducted their investigation, it would be raised by virtue of an evidentiary challenge, not a statutory challenge as was confused by the amici curiae in the instant case. *See e.g. State v. Bryant*, 287 Minn. 205, 177 N.W.2d 800 (1970) (cited in Mem. Law of Amici Curiae ACLU and ACLU MN Supp. Def. at 8, 9.) The fact that other police departments have chosen other tactics has no bearing on whether the statute is constitutional and more importantly, no bearing on whether the Defendant should be allowed to withdraw his plea.

IV. THE COURT SHOULD STRIKE FROM ITS CONSIDERATION THE DOCUMENTS SUBMITTED BY THE PARTIES ATTEMPTING TO PARTICIPATE AS AMICI CURIAE.

Motions to strike are appropriate in the criminal setting where evidence ought not to be considered in making determinations. *See, e.g., State v. Thompson*, 273 Minn. 1, 17, 139 N.W.2d 490, 503 (1966). For all the reasons set forth in prior sections of this submission, the Memorandum submitted by the amici curiae is improper. Likewise, and for the same reasons, it would be inappropriate to allow the submissions of the amici

curiae to remain a part of the record that the Court will consider in determining whether to deny or grant the Defendant's Rule 15.05 motion. The Court should strike the submissions of the Requestors seeking to participate as amici curiae in order to prevent their improper inclusion in any consideration of the motion before the Court.

CONCLUSION

The Memorandum, which the amici curiae included in the record of this case in the midst of a motion to withdraw, is replete with issues that were not and are not otherwise before this Court and therefore are inappropriate for the role of amici curiae. Moreover, the contentions by the amici curiae are inapplicable to the case at bar and/or without merit.

For the reasons set forth herein, the Court should strike the Memorandum from consideration in the Rule 15.05 motion.

Respectfully Submitted,

Dated: September 20, 2007

By _____

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